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Nos. 00-1751, 00-1777, 00-1779

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, et al.,

Petitioners,

v.

DORIS SIMMONS-HARRIS, et al.,

Respondents.

And Related Cases

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF AMICUS CURIAE FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. The League's headquarters is in New York City. Its cooperating affiliates across the country assist in activities national in scope. The Catholic League aims to expose and correct stereotypes of Catholic belief and of the Church in the media, in popular culture, and in government actions. In this way the League seeks to protect individual Catholics as well as the Church against defamation and discrimination.

This litigation, like all this Court's cases involving public aid to parochial schools, involves a predominant number of Catholic schools. The decision of the Sixth Circuit should be reversed because it depended upon the District Court's characterization of the Catholic schools involved as "pervasively sectarian." The characterization is not only mistaken. It rests upon a grave misunderstanding of Catholic doctrine on education, on religious freedom, and of the mission and purpose of Catholic schools. The lower courts also ignored important relevant Catholic doctrines, especially as they are found in the authoritative teachings of the Second Vatican Council (1962-1965).

The Catholic League files this brief to promote this Court's understanding of Catholic elementary and secondary schools.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, nor its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This Court has stated on many occasions that the central aim of the Religion Clauses is to forestall state-sponsored indoctrination. Whenever the government – directly or indirectly, subtly or overtly – prescribes the meaning and content of religious belief, this core command is violated. The government may not set up a church, compose a prayer which all are bound to recite, discriminate against a religion it deems false or inconvenient, or favor another it deems true or helpful. Nor may the government base adverse treatment of believers upon its – the government's – definition of what they believe. This Court has consistently stated that civil authorities are bound to accept a religious institution's definition of its doctrine and beliefs. See, e.g., *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. (1976); *Jones v. Wolf*, 443 U.S. 595 (1979). This Court has consistently interpreted the Free Exercise Clause to require the government to accept a sincere believer's statement of what he believes, no matter how strange or singular those beliefs may seem to others, including judges. See, e.g., *Thomas v. Review Board*, 450 U.S. 707 (1981); *Frazee v. Illinois*, 489 U.S. 829 (1989). And the government is bound to accept the implications and inferences drawn by believers, even where they appear to be illogical or unwarranted. See *Thomas, Frazee*.

Of course, none of these holdings implies that believers are entirely free to act upon their beliefs. The common good often requires that religious conduct be regulated. See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990). Sometimes a particular religious practice may be the basis of discriminatory treatment by the government. See *Bob Jones University v. United States*, 461 U.S. 574 (1983) (alleged racist practices warranted withdrawal of the college's tax exempt status). But the Religion Clauses lose much of their meaning unless the government is under a constitutional duty to get it right, to

accurately identify and to understand the pertinent religious beliefs or practices. It may be constitutionally legitimate for government to discriminate among churches or religious schools due to their engagement in political campaigning or in racially discriminatory practices. But the Religion Clauses impose a high burden of proof: the government must show by clear and convincing evidence that the beliefs and practices of the religious group, as the believers state and interpret them, are racially discriminatory, or do amount to electioneering. Civil authorities are competent to decide, within limits, what questions to ask about a religion and its practice in order to care for the common good. But the answers must be those of the faithful, not of the magistrate.

The judgment of the Sixth Circuit must be reversed for failure to discharge this constitutionally imposed duty. The District Court's characterization of the Catholic schools in this case as "pervasively sectarian," upon which the Sixth Circuit implicitly but necessarily relied, rests upon a misunderstanding of the mission and practices of Catholic schools. The misunderstanding was so gross as to amount to unconstitutional stereotyping.

The courts' principal errors were two. They were, unfortunately, interdependent, and the combined effect was disastrous. One error was to expound record material concerning the schools' mission and practices without consulting, much less deferring to, authoritative Catholic definition and interpretation of key concepts. The court ignored altogether other pertinent Church teachings. As a result, the courts below struck down the vouchers program on the basis of a state version of Catholicism. Were the pertinent Catholic teachings allowed to speak for themselves, it would have been clear that the schools involved here are not "pervasively sectarian," as this Court has specified the meaning of the term.

The second error was the lower courts' complacent reliance upon this Court's declarations, in the mid-1970's, that Catholic schools were then "pervasively sectarian."

The courts correctly held themselves to be bound by Supreme Court authority. They properly rejected the opportunity to anticipate a modification or overruling by the Supreme Court of one its own precedents. But the lower courts were bound to apply the 1970's statements on "pervasively sectarian" in light of this Court's 1990's church-state rulings, especially *Smith* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1983). Nor did the lower courts heed the admonitions of this Court in *Mitchell v. Helms*, 530 U.S. 793 (2000) about the prejudice and perniciousness surrounding the characterization "pervasively sectarian." *Id.* at 828-829. Failing to do so, the courts relied upon aspects of Catholic schools' practices which this Court has declared to be constitutionally sacrosanct, and no licit basis for government discrimination.

The combined effect was a decision discriminating against Catholic schools based upon a caricature, and upholding state discrimination based upon what are, in truth, constitutionally forbidden grounds.

ARGUMENT

I. THE LOWER COURTS' CHARACTERIZATION OF THE CATHOLIC SCHOOLS WAS BASED PARTLY UPON A FALLACIOUS INFERENCE FROM FALSE OR MISLEADING PREMISES.

The District Court found that of fifty-six participating schools, forty-six, or about 82 percent, were (as of the start of the 1999-2000 school year) religiously affiliated. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836-837 (N.D. Ohio 1999). More than 60 percent are Roman Catholic. Given these statistics, the court expressly found that "parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate."

Id. at 864. This case, the court reasoned, was thus "virtually indistinguishable" from the tuition reimbursement program struck down in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in which the majority of benefited schools were also sectarian.

The predominance of sectarian schools in this Ohio voucher program, the court argued, means that the voucher aid "directly benefits the religious functions of participating sectarian institutions because it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of the recipients." *Id.* "A program," the court concluded, "that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools. For both of these reasons, the court finds the Program to be in violation of the Establishment Clause." *Id.* at 865.

From start to finish, the court's argument rests upon the view that the "sectarian" schools involved are "pervasively sectarian." For the "predominance" of religiously affiliated schools in the voucher program could not raise an Establishment concern unless "pervasively sectarian." In its opinion the District Court explicitly pays homage to *Bowen v. Kendrick*, 487 U.S. 589 (1988): " 'One way in which direct government aid might have that [primary] effect [of impermissibly advancing religion] is if the aid flows to institutions that are "pervasively sectarian." ' " 72 F. Supp. 2d 834 (quoting *Bowen*, 487 U.S. at 609-10 (Rehnquist, C.J.)). By essentially affirming the District Court's reasoning, the Sixth Circuit relied equally upon the "pervasively sectarian" view, as Judge Ryan noted in dissent: "The majority . . . attempts to support its view . . . by utilizing the transparent argument that this statute should be struck down because the religious

schools in the program are too religious." *Simmons-Harris v. Zelman*, 234 F.3d 945, 969 (6th Cir. 2000).

The reliance of the lower courts upon the characterization of the sectarian schools in the Ohio voucher program as "pervasively sectarian" is both inaccurate and unwarranted. Once deconstructed, their argument is left without a foundation.

A. The Fallacious Inference

The lower courts naturally sought guidance from this Court's cases on school aid, decisions which have been, as a matter of fact and as a matter of explicit analytical reliance, about Catholic schools.[2] The District Court and (implicitly) the Sixth Circuit adopted this Court's view, expressed often in the 1970's, that Catholic primary and secondary schools are "pervasively sectarian." The term never acquired another referent: no college (Catholic or

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[2] In *Everson*, Justice Rutledge reminded the Court (330 U.S. at 31) that all the affected pupils attended Catholic schools. Ninety-five percent of the students in the Rhode Island program invalidated in *Lemon* attended Catholic schools in the Pennsylvania program; ninety-six percent were church-related schools, and "most" of them were Catholic. 403 U.S. at 608, 610. "Practically all" of the affected students in *Nyquist*, the Court wrote, were Catholic. 413 U.S. at 78. In *Meek*, the Court recognized that seventy-five percent of the affected Pennsylvania schools were church related, and further observed that the beneficiaries of the challenged program there were mostly Catholic. See 421 U.S. at 364. In *Wolman*, the figure, according to the Court, was ninety-two percent enrolled in Catholic schools. 433 U.S. at 234. Interestingly, *Bd. of Education v. Allen*, which upheld aid to nonpublic schools, is an exception: the Court's opinion did not explicitly refer to the percentage of beneficiaries who were Catholic. The *Allen* court said only that twenty-two percent of all New York's school children – some 900,000 – attended nonpublic schools. 392 U.S. at 248, n.9.

otherwise) has ever been deemed by this Court to be "pervasively sectarian," and no non-Catholic K-12 school has figured independently in the decided cases.

Although this Court did not use the phrase, the concept of "pervasively sectarian" first figured in a denial of aid to private schools in 1971, in *Lemon v. Kurtzman*, 403 U.S. 602. The precise meaning of "pervasively sectarian" was elusive, but its analytical function was clear: it was the characterization necessary to render unconstitutional *all* "direct" aid to (at least) the educational function of Catholic schools. "Pervasively sectarian" meant that (somehow) religious training was everywhere in the school, or nearly so. Deeming a school "pervasively sectarian" made possible the conclusion that any aid, even if ostensibly limited to secular activities of the Catholic school, inescapably advanced religion.

The *Lemon* Court abandoned the conclusion, stated just three years earlier in *Allen*, that the secular education in religious schools was autonomous from religious training. *Allen* said also, relying upon *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that the state had a legitimate interest in the competent teaching of nonreligious subjects in parochial schools. See *Allen*, 392 U.S. at 245. The *Allen* Court never denied, although it did not explicitly affirm, that the Catholic schools in *Pierce* (or in *Allen*) had an integrated, religious mission. They were, the opinion for the Court by Justice White repeatedly said, "parochial" schools. The Court chose nevertheless to rest its analysis not upon the overall mission or identity of the schools, but upon the autonomy of secular training in them.

Beginning in *Lemon*, this Court shifted the focus of its church-state analysis from the public good – secular instruction – provided by parochial schools, to the overall

"mission" of those schools. At the same time, the Court decided to consider them not simply as private or parochial (as had *Allen*), but precisely as Catholic.

The unexplained shift in focus was unfortunately carried through by a fallacious argument. Although writing separately for himself in *Lemon*, Justice Brennan's expression of the new focal point was adopted by the Court in *Meek*: "The secular education those [Catholic] schools provide goes hand in hand with the religious mission which is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Meek*, 421 U.S. at 366 (quoting *Lemon*, 403 U.S. at 657 (Brennan, J., concurring)). More recently, the Fifth Circuit adopted this view in *Helms v. Picard*, 151 F.3d 347, 355 (5th Cir. 1998), only to have it rejected by a plurality of the Supreme Court in *Mitchell v. Helms*, 530 U.S. 793 (2000). By contrast, the Sixth Circuit in the present case explicitly eschewed the *Mitchell* plurality in favor of Justice O'Connor's concurrence: "[Justice O'Connor] found 'the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and . . . unnecessary to decide the instant case.' " 234 F.3d at 957 (citing 530 U.S. at 836-839). In effect, the Sixth Circuit returned to the *Meek* view, necessarily considering the *Meek* statement – let us call it Proposition 1 – inconsistent with *this* statement – call it Proposition 2 – from *Allen*: "the processes of *secular* and *religious training* are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the *teaching of religion*." 392 U.S. at 248. [emphasis added, in both cases.]

The truth is, however, that Proposition 1 and Proposition 2 are not inconsistent. They may both be true. And, if "religious mission" is defined according to Catholic – not

state – doctrine, they both *are* true. But, since *Lemon*, the cases have mistakenly inferred from the "religious mission" of Catholic schools – a proposition here granted – that the teaching of secular subjects in them was characteristically infected with religious indoctrination, or with (however stated) some inadmissible sectarian influence.

A glance at the Propositions 1 and 2 suggests the overlooked possibility: secular education, delivered in its full integrity and as competently as in public schools, is part of Catholic schools' "religious mission."

Some courts have meant to say, when they committed themselves to Proposition 2, that Catholic schools' "religious mission" requires (or licenses or is otherwise responsible for) teaching math or geography or civics in an inadmissibly "sectarian" fashion. But *that* is the proposition which needs to be proved. It is the missing premise, and surely does not follow from what Catholics mean when they say, in so many words, that their schools have a religious mission.

For Catholic hospitals, social services agencies, and schools are all considered by Catholics to be "institutional ministries." They all have a specifically Catholic mission or identity. This is as true of Catholic colleges (which, again, have never been held to be "pervasively sectarian") as it is of Catholic grade schools. But this hardly implies that surgeons at Catholic hospitals do sectarian surgery, or that physics professors at Catholic colleges teach Catholic physics. Mother Teresa of Calcutta ran hospices, and surely they had a religious mission. They were nevertheless hospices. Up until a few years ago religious brothers of Holy Cross supplied from farms near South Bend fresh food for the dining halls at Notre Dame. These dedicated men had a specific mission within the overall religious mission of the University of Notre

Dame. But they were still farmers. There was nothing sectarian about their soybeans.

The *Meek* Court drew attention to the alleged compound of secular and sectarian when it said that "the very purpose of many of these schools is to provide an integrated secular and religious education". 421 U.S. at 366. Granted. But "integrated" need not mean, and in Catholic usage does not mean, the introduction of doctrine into math or geography class. The *Lemon* Court noted that the District Court in that case had concluded that "the parochial school system was an integral part of the religious mission of the Catholic Church." 403 U.S. at 609. Granted. Hospitals and colleges are, too. Neither has been deemed "pervasively sectarian."

Nothing said here implies that it *cannot* be the case that secular subjects in some religious school are vehicles for indoctrination, or that *all* secular subjects *are* autonomous from religious instruction in *all* types of religious schools. A school which taught *as* science the biblical account of a seven-day creation would, to that extent, "sectarianize" (to invent a term) science. But Catholics do not believe in a young earth; they do not teach Creation Science. One simply cannot infer from the fact that a Catholic school (or college or hospital or orphanage) has an integrated purpose and a Catholic identity – call it a "religious mission" – that all or most (or much, in some cases) that happens therein is tantamount to religious instruction.

B. The Faulty Premises

There are two premises in Proposition 1. One is that Catholic schools have "a religious mission." The other is that this "religious mission" is the "only reason" for their

existence. Assuming that Catholic schools have a "religious mission" (given the generality of the term, it is clear that they do), it is odd to add that it is the "only reason" for their existence. It is odd because once one states the "mission" of a Catholic school – or of any other institution, for that matter – one has stated its reason for existence. That is generally what a "mission" amounts to.

One reading of the statement that the schools have a "religious mission" that is the "only reason" for their existence, is that instruction in doctrine predominates in the school. Taken most straightforwardly, this statement would imply the unconstitutionality of Catholic schools' state certification, within the terms of compulsory attendance laws. It would be like certifying a vacation bible school as a summer session of required elementary education. But no one argues that Catholic schools should be decertified. Catholic schools deliver the curriculum, and other services, required by public authority. This part of *Allen* has never been questioned. Moreover, if indoctrination were the predominant function of the Catholic school, non-Catholics would have little reason to enroll, and few would. But Catholic schools, especially in urban areas, enroll substantial numbers of non-Catholic students, in some cases, a majority.

II. AUTHENTIC CATHOLIC DOCTRINE ON EDUCATION: SCHOOLING IN "AN ATMOSPHERE ANIMATED BY A SPIRIT OF LIBERTY AND CHARITY BASED UPON THE GOSPEL."

It is surely not the "mission" of Catholic schools to "indoctrinate" pupils, or (to use less loaded terms) to transmit the faith to children, less is it the "only reason" for their existence. Historically, a separate Catholic school system was started to protect Catholic children from the

scandal of aggressive Protestantism in the public schools. See generally Charles Leslie Glenn, Jr., *The Myth of the Common School* (1988). Today many see in the Catholic school a disciplined, value-centered environment which, apart from the special opportunity to learn the Catholic faith, is sufficient reason to enroll.

The mission of Catholic schools is first and foremost, to be a school. Here is the mission of a school – any K-12 school – as the Church authoritatively describes it:

> Nurturing the intellectual faculties . . . is its special mission. It develops a capacity for sound judgment and introduces the pupils to the cultural heritage bequeathed to them by former generations. It fosters a sense of values and prepares them for professional life. By providing for friendly contacts between pupils of different characters and backgrounds, it encourages mutual understanding. Furthermore, it constitutes a center in whose activity and growth not only the families and teachers but also the various associations for the promotion of cultural, civil and religious life, civic society, and the entire community should take part.

VAT. II, *Gravissimum Educationis* (Declaration on Christian Education), § 5. [Hereafter, GE].

The "special function" of the *Catholic* school – i.e., that which distinguishes it from other schools – is "an atmosphere animated by a spirit of liberty and charity based upon the Gospel." GE § 8. *This*, according to the bishops and cardinals assembled at the Second Vatican Council, speaking in union with the Pope, is the "prototype," to which "all schools which are in any way dependent upon the Church should conform so far as possible." GE § 9.

In its December 1997 document, *The Catholic School on the Threshold of the Third Millennium*, the Vatican Congregation for Catholic Education (the highest Church authority, other than the Pope, on Catholic schools) said the "goal" of the Catholic school is "the promotion of the [whole] human person," including the intellectual, moral and spiritual spheres. See § 9. The Catholic school mission statements quoted by the District Court in this case echo this aim: "an integral part of the school program is instruction in religious truths and values. These values permeates [sic] the whole atmosphere of the school." 72 F. Supp. 2d at 838 (quoting St. Rocco School Handbook at 3). But they must be understood according to the mind of the Church, not the mind of the civil authorities.

Here, then, is an authentically Catholic articulation of an alternative to "pervasively sectarian:" "an atmosphere animated by a spirit of liberty and charity based upon the Gospel." *This* is the Catholic meaning – and given the cases, the only relevant constitutionally available meaning – of "religious mission." Can one infer from the pervasive spirit of liberty and charity that secular teaching is, after all, "so intertwined" with religion that aid to Catholic schools impermissibly advances religion? Does this "atmosphere" supply the premise missing from Proposition 1?

There are three main components of the atmosphere of liberty and charity. Together with explicit instruction in the Catholic faith and practice – which is done in separate, distinct religion classes – they constitute the distinguishing Catholic component of the Church's K-12 schools. Neither one alone, nor all combined, gives rise to the inference that secular subjects are infused with sectarian content. In fact, they demonstrate precisely the correctness of *Allen*; that is, of Proposition 2.

III. THE ATMOSPHERE OF LIBERTY AND CHARITY BASED UPON THE GOSPEL WHICH ANIMATES CATHOLIC SCHOOLS DOES NOT UNDERMINE THE AUTONOMY OR INTEGRITY OF TEACHING SECULAR SUBJECTS.

A. Instruction And Training In The Catholic Faith.

The District Court examined ample evidence of the fact that Catholic grade schools engage in a substantial amount of religious education and training. There are religion classes, sacramental preparation, regular worship, and some religiously oriented extracurricular activities. 72 F. Supp. 2d at 837-838. But no case has held that the presence of a sizable amount of explicit religious training makes a school "pervasively sectarian." Petitioners do not seek to make this the first.

That the faith is taught basically explains why, despite the autonomy of secular subjects, Catholic schools are subject to the authority of the Church's pastors. It is an article of the Catholic faith that wherever the faith is taught, there is episcopal responsibility. This is true at the college level. Yet no Catholic college has ever been deemed "pervasively sectarian." According to the law of the Catholic Church, the bishop of Cleveland, for example, is responsible for the teaching of the faith in that place. See 1983 *Code of Canon Law* § 375, et seq. This extraordinary authority is based upon the solemn belief of Catholics, based upon the Gospel, that Jesus transmitted to the Apostles His own divine authority, and that the Apostles left bishops as their successors. Bishops therefore teach with the authority of Christ. See VAT. II, *Dei Verbum* (Dogmatic Constitution on Divine Revelation), § 7.

According to Church law the bishop is responsible for the welfare of Catholics in his territory. VAT. II,

Christus Dominus (Decree Concerning The Pastoral Office of Bishops), § 11. But this does not mean that he is involved in all the Church's local activities, or that all the Church does under his authority has to do with religion itself. The physical plant of a large archdiocese like Cleveland is the size of a small city. The many people responsible for servicing the plant perform tasks which are indistinguishable from those performed by, say, their municipal counterparts, even if the former work under the Archbishop's supervision.

The *Lemon* Court spoke of how "religious authority" pervaded the whole school system. 403 U.S. at 617. The District Court involved in *Mitchell* noted that the schools operated under the "general supervision" of the local bishop and the parish pastor, and counted such episcopal oversight as evidence of an illicit religious-secular compound. Petition at 143a. But on a proper understanding of Catholic doctrine, it is the counting which is illicit. The bishop possesses, it is true, a general supervisory role. But that arises, and has little meaning apart, from his special competence as authoritative teacher of the faith. It is either question begging or a form of illicit double counting to add his authority to the explicit teaching of religion as evidence of "pervasive sectarianism." His authority is an implication of what no one denies: Catholic schools teach the Catholic faith.[3] Again, however, this Court has never held that that alone renders a school pervasively sectarian.

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[3] The bishop may also hold legal title to all the church buildings in the locale, including grade schools. If so, then his authority pervades the schools for another reason independent of the integrity of secular teaching.

B. Personal Vocation

The atmosphere of liberty and charity in Catholic schools prominently includes teachers who live out and thereby witness to their *personal vocation*. What is the meaning of this crucial term?

Probably no concept was more central to the renewal of the Church accomplished at the Second Vatican Council in the mid-1960's than that of "personal vocation." Prior to that time "vocation" was widely understood to refer to the callings of priests, nuns, and brothers to the specifically religious life of chastity, poverty, obedience. But the Council reinvigorated the traditional teaching, then obscured, that everyone has a vocation. All lay persons – bricklayers, policemen, housewives, doctors, retirees – have a vocation, a specific calling from God to participate in building up good on earth, and thereby storing up material for heaven. The critically important thing is that vocation attaches religious meaning and significance – indeed, the highest kind, for it has to do with what God is calling one to do with one's life – to what are usually very mundane tasks:

> But by reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God's will. They live in the world, that is, they are engaged in each and every work and business of the earth and in the ordinary circumstances of social and family life which, as it were, constitute their very existence. There they are called by God that, being led by the spirit to the Gospel, they may contribute to the sanctification of the world, as from within like leaven, by fulfilling their own particular duties.

VAT. II, *Lumen Gentium* (Dogmatic Constitution of the Church), § 31.

The Holy Cross Brothers who cultivated soybeans near South Bend had a personal vocation. So did all the other Catholic farmers in the area, as did the truckers who carried the produce to campus, and the food service workers who prepared it. This notion of personal vocation is basically identical to what then Vice President Gore meant when he said "The purpose of life is to glorify God." See Nat Hentoff, *God in School*, Washington Post, August 7, 1999, at A19. Mr. Gore did not mean that he would, or that anyone should, ceaselessly preach Christian doctrine. He meant that one should, and that he would, glorify God by doing well those tasks – secular ones – entrusted to him. Given the deep Christian convictions of so many Americans throughout our history, one may suppose that many members of Congress, governors, presidents, and judges have performed their constitutional duty as a calling from God, and as a way to praise God.

The aim of much recent Catholic theology of work and of Catholic engagement with contemporary culture – an engagement whose Latin term, *aggiornamento*, stands as one description of the Council's whole project – is to sanctify ordinary daily tasks. "Sanctification" is to do exactly what the non-Catholic person next to one does, but to do it well in order to serve God, to do it with a supernatural purpose added to the ordinary purpose of getting the job done. One may conclude that God wants one to be a farmer, a secretary, a toll collector, or a president. In each case one fulfills one's vocation by being the best secretary, or president, one can be.

The Declaration on Christian Education attaches the "highest importance" to the "vocation" of teachers, who

"help parents in carrying out their duties and act in the name of the community by undertaking a teaching career." GE § 5. The Declaration does not here mean the Roman Catholic "community" but the civil community. This is one reason why the sense of religious calling (or "vocation") which Roman Catholics (and members of other religious groups) experience teaching secular subjects *cannot* distinguish the "pervasively sectarian" school: it does not distinguish between public and private school teachers. A Catholic teaching in a public school would be living according to her personal vocation as much as a teacher in a Catholic school.

An additional, and more fundamental, reason why this important concept cannot be used to distinguish a "pervasively sectarian" school is that it would be unconstitutional to do so, a violation of the Free Exercise Clause, as interpreted by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993). Those cases stand for the proposition that where an action is generally prohibited, the Constitution does not require different treatment for believers who engage in the activity for religious reasons, or for the religious significance they see in or attach to it. The cases also stand for this corollary: where public authority generally permits an activity – say slaughtering animals – it may not discriminate against persons who would engage in the activity for religious reasons or for the religious significance they see in or attach to it. "It would doubtless be unconstitutional," the *Smith* Court said, "to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf." 494 U.S. at 877-78.

From these cases, one thing is perfectly clear: it would violate the Free Exercise Clause for the government to discharge or otherwise discriminate against a public school math teacher on the ground that the math teacher, like former Vice President Gore, was known to consider teaching math his calling from God. It follows that the presence of a similarly dedicated math teacher in a Catholic institution, or even a number of such devout teachers, cannot justify discrimination against that school.

C. Teachers As Moral Exemplars: Gospel Charity

The Second Vatican Council said that teachers "should bear testimony by their lives and their teaching to the one Teacher, who is Christ." GE § 8. This "testimony" is not preaching or explicit instruction in the faith. It is the silent "witness" one gives by living out one's personal vocation, by living a life of Christian charity. The more recent document on schools in the new millennium states: "teachers and educators fulfill a specific Christian vocation and share an equally specific participation in the mission of the Church to the extent that it 'depends chiefly on them whether the Catholic school achieves its purposes.' " *The Catholic School on the Threshold of the Third Millenium* § 19 (quoting GE § 8).

Catholic teachers are, in light of these authentic teachings, required to be examples of the morally upright life. In the 1960's the Archbishop of New Orleans publicly excommunicated – declared outside the Church – three ardent segregationists. See Timothy A. Mitchell, *A History Lesson*, Newsday, July 2, 1990, at 40. The District Court involved in the *Mitchell* case cited a policy of the Archdiocese of New Orleans by which teachers and principals might be discharged for a public lifestyle contrary to

church teaching. Similar policies are no doubt in effect in Cleveland, and in other dioceses throughout the country. We should thus expect that no segregationist or racist would find employment in New Orleans' Catholic schools, or in Cleveland.

That teachers are expected to exhibit good character is not a peculiarly Catholic policy. All teachers, if not most employees of all types, are expected to be of good character. That good character is expected to pervade Catholic schools is therefore no evidence of a suspect sectarianism. It is probably true that a few moral norms to which Catholic teachers must conform are not standards to which their public counterparts must conform. An adulterous relationship, for example, could lead to dismissal in a Catholic school but perhaps not in all public schools. But this, too, is not evidence of "sectarianism." For the Church teaches, as a matter of doctrine, that moral norms such as the prohibition of adultery are "written on the hearts" of all persons, that neither revelation nor the teaching authority of the Church is necessary to know that adultery, for example, is wrong. See Romans 2:14-15; John Paul II, Encyclical Letter *Veritatis Splendor*, §§ 75-9 (1993). Catholics believe that the immorality of such acts is part of the common patrimony of humanity, part of the natural moral law. And it is surely true that representatives of all the great religious traditions in America – Christian, Jewish, Muslim, Mormon – could, and do, accept them as valid.

It is and has always been the doctrine of the Church that in matters of what is today called "lifestyle," *everything* she teaches can be known by reason alone. If respondents wish to show that instead the Church teaches what is unreasonable, or what reason cannot know – and that therefore the good character of Catholic

teachers is a "sectarian" presence in the schools – then respondents (or anyone else who adopts that position) will have to prove it. They will have to engage, and refute, rational arguments by Catholics and others that justify Catholic teachings. That task has not been attempted in this case.

D. The Inference Stated As The Proposition That Secular Subjects Are Infected With Religion Is Unproved. Evidence Given For It In The Cases Amounts To A Violation Of The "Content Neutrality" Commanded By The First Amendment.

Catholic schools, Justice Douglas said in his concurrence in *Lemon*, "give the church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses." *Lemon*, 403 U.S. at 630-31 (Douglas, J., concurring). Justice Rutledge, dissenting in *Everson*, said that religious and secular teaching are "commingled," causing the entire Catholic school to be "permeated" with religion. *Everson*, 330 U.S. at 47 (Rutledge, J., dissenting). Justice Douglas, dissenting in *Allen*, speculated about a "creeping sectarianism [which] avoids the direct teaching of religious doctrine but keeps the student continually reminded of the sectarian orientation of his education." *Allen*, 392 U.S. at 260 n.9 (Douglas, J., dissenting). He speculated that "[s]ome parochial schools may prefer those texts which are liberally sprinkled with religious vignettes." *Id.* He cited no evidence of the preference, and the texts challenged in *Allen* were approved by the state for use in public schools. But we are evidently invited to imagine students doing math problems with rosary beads, or practicing diagramming sentences drawn from the Baltimore Catechism. If and

when the record is compiled in a lawsuit – but, mercifully, not before – courts may have to grapple with the question of how many "vignettes" is one too many.

That number is surely much greater than zero. This Court had said that even *public* schools are not constitutionally required to ban the study, much less the mention (in "vignettes" or otherwise), of religion. *Schempp* invalidated devotional reading of the Bible in public schools. The *Schempp* Court stressed, however, that the Establishment Clause did not evict religion from the curriculum. See *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). Integrated into the teaching of history, civilization, ethics, comparative religion and the like, the Ten Commandments may appropriately be taught. See *Stone v. Graham*, 449 U.S. 39, 42 (1981). The teaching of these cases is that public schools may not teach any sectarian doctrine as true. But the cases also mean that teaching about religion, say, through story telling or "vignettes," is not to be confused with prohibited indoctrination. For this reason, the many examples adduced by Justice Douglas of "creeping sectarianism" – which signers of the Declaration of Independence and the Constitution were Catholic, that Sir Edmund Hillary left a crucifix on Mt. Everest – do not count as evidence of "indoctrination." A *public* school teacher so inclined might just as well mention such curiosities. These "vignettes" may remind younger members of a particular minority group of the secular achievements of their forebears, accomplishments which may be consciously slighted in the public schools. In any event, such cultural and ethnic awareness is not peculiar to Catholic schools.

Justice Douglas' spirited assertions are generally wide of the mark. But they nevertheless express an important truth: many subjects required by state licensing

authorities – history, civics, and English – do not permit elimination of the personal interpretations of the teacher. No complete "objectivity" or "neutrality" is possible; insisting otherwise is either naive or an exercise in ideology. Depending upon the subject, upon student sophistication, and upon the ambition of the course, questions legitimately arise within classes in secular subjects which cannot be answered without reference to *some* point of view, *some* interpretive guide, *some* set of evaluative criteria, *outside* the subject. What caused the American Civil War? Did the Vietnam War conclude with an honorable peace? Should a literature course include Huckleberry Finn? If so, what should the teacher say about its portrayal of African-Americans? What did this Court mean when it said in *Brown v. Board of Education*, 347 U.S. 483 (1954), that African-Americans educated in segregated schools suffered psychological harm from the experience?

Where the state requires certain subjects to be taught, and where those subjects call for subjective treatment by individual teachers, a teacher's "take" does not smudge the subject's autonomy or integrity. The subject is completed, not compromised, by the added perspective.

Justice Douglas consistently used religiously loaded – which is to say, very Catholic – examples, including the Crusades and the Inquisition. But he had a point: there *will* be interpretation and evaluation by teachers of some mandated subjects. But what, exactly, is supposed to follow from that fact? The Justice seems to have thought that there were (wrong) sectarian answers, and (right) objective answers, to the inevitable interpretative questions. But objectivity is not possible here. And, as this court squarely held in *West Virginia State of Education v. Barrette*, there can be no politically "orthodox" answer. 319 U.S. 624, 642 (1943). What then could distinguish the

parochial school teacher's viewpoint as "sectarian" – as a basis for discriminatory treatment – from the public school teachers "objective" viewpoint?

It is true that teachers in Catholic schools may deal with the inevitable subjective elements of a course in a way consonant with Catholic teaching. This is one reason why practicing Catholics are preferred as teachers in Catholic schools. But to discriminate against institutions which adopt a particular viewpoint on debatable interpretations of required subjects such as history, civics, and literature, is to violate the viewpoint neutrality required by the First Amendment. See *Lamb's Chapel*, 508 U.S. 384 (1993).

The Catholic school is obviously not a government forum of any kind. But *Lamb's Chapel* is still closely analogous. Here we have a situation where the government certifies a school and requires it to teach certain courses. Those subjects, then, are much like the designated topics available for treatment in the nonpublic forum in *Lamb's Chapel*. The rule of that case applies: "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 508 U.S. at 394 (quoting *Corneliau v. NAACP*, 473 U.S. 788, 806 (1985)). The government here is not "suppressing" speech. But the reason why it may not suppress speech in a government forum is the reason why it may not discriminate at all against viewpoints on required subjects: the First Amendment's required neutrality.

IV. CATHOLIC DOCTRINE FORBIDS "INDOCTRINATION" AS THAT TERM IS USED IN THE CASES: GOSPEL LIBERTY

"Indoctrination" is a term more often used in the cases than explained in them. This Court has often treated "inculcation" as a synonym. "Indoctrination" might therefore mean "teaching," the transmission of a particular body of thought – Catholicism – through lengthy instruction. If this simple meaning is the intended one, Catholic schools do not come close to "pervasively" indoctrinating students. No one asserts that Catholic schools teach religion most of the time – save in an extended, less wholesome, meaning of "indoctrination," to which we now turn.

The case containing this Court's most informative expression of what "pervasively sectarian" means did not involve primary and secondary schools, but Catholic colleges. In deciding that Catholic colleges were not "pervasively sectarian," Chief Justice Burger, writing for a plurality in *Tilton v. Richardson*, 403 U.S. 672 (1971), opined that college students were "less impressionable" and "less susceptible to indoctrination" than younger pupils. College students' "skepticism" equipped them to resist indoctrination. The "internal discipline" and "academic freedom" of higher education courses limited the opportunity for "sectarian influence." Finally, the Chief Justice observed that church colleges sought "to evoke free and critical response from the students." *Tilton*, 403 U.S. at 672.

The Chief Justice clearly sought to unfavorably compare, along all these lines, Catholic K-12 schools to Catholic colleges. He made explicit in *Tilton* what was often implicit, or evidently presupposed, in the K-12 cases: religious "indoctrination" was not the simple teaching of

Catholicism. The "indoctrination" characteristic of the lower schools traded upon pupils' lack of freedom and critical reflection. It did so in two ways. Either the students were commanded to believe – and that was that – or they were manipulated into believing, through a kind of brainwashing rather than through free assent. "Indoctrination" was heavy-handed, or insidiously subliminal.

The many judicial observations of Catholic schools offered to show "indoctrination" have appealed to popular stereotypes of Catholics (generally, not just children) as regimented followers, being commanded by their hierarchical masters. Caricatures so gross, and so harmful to another ethnic, racial, or religious minority, are not easily located in the U.S. Reports. (At least in cases that retain respectability. Cf. *Bradwell v. State*, 83 U.S. 130 (1872); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896); *Buck v. Bell*, 274 U.S. 200, 207 (1927)).

The judicial caricature of Catholic belief and practice requires only the following two-part rejoinder. One is that the role of liberty in any grade school child's education is limited and conditional. The state *compels* them to attend school. The state *compels* all schools, including Catholic schools, to teach certain secular courses. America's grade school children are, finally, present in a U.S. History class, for instance, because the state *compels* them to be present.[4] The liberty which permits some children to

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[4] We should not pretend that public schools do not seek to mold student's minds and hearts about a great many things. Students do not learn the virtues of socialism or racism in American primary schools, and that is a good thing. We cannot pretend that the students have any choice but to be present as they are taught that George Washington was the father of the country and that Martin Luther King was a great civil rights leader.

attend Catholic, rather than state schools, is not the liberty of any child. It is the liberty of parents. Their constitutional right to choose nonpublic schools this Court first recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This liberty the Catholic school respects even more than the state school, at least for parents who wish their children to receive an integrated education. This parental liberty has been from time out of mind the foundational moral imperative of Catholic educators. Parents, the Church has always taught, have the primary duty and therefore the right to direct the education of their children. All educators, including those running Catholic schools, are bound to view themselves as assisting parents to discharge, as the Catechism of the Catholic Church (§ 2221) states, this "primordial and inalienable" right and duty.

The parochial-school-aid cases are suffused with the specter of "indoctrination." Yet – and it does not go too far to term this omission shocking – in no case has this Court noticed the authoritative teaching of the Church on the most relevant subject: religious freedom. The Vatican Council in 1965 published *Dignitatis Humanae*, (Declaration on Religious Freedom) [Hereafter DH]. There, in solemn form, the Council Fathers speaking in union with Pope Paul VI, said that every human person has the right to religious freedom. Everyone is entitled to be free – by divine ordination – from coercion in religious matters. For God so created people and the rest of the world that "the truth cannot impose itself except by virtue of its own truth, or it makes its entrance into the mind at once quietly and with power." DH, § 1. "In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows

that he is not to be forced to act in a manner contrary to his conscience." DH, § 3.

These moral constraints upon the presentation of the faith do not pertain only, or even particularly, to the state, as if Catholic educators were free to coerce (or regiment or "indoctrinate") where the state is not. The morality of free religious belief protects everyone, and it constrains everyone. The pertinent moral norm is this:

> In spreading religious faith and in introducing religious practices everyone [including religious communities] ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or a kind of persuasion that would be dishonorable or unworthy. . . . [DH § 4 emphasis added.]

Were Catholic educators to command belief or manipulate children into accepting the faith, they would be acting immorally. A Catholic school which "indoctrinated" its pupils would not be Catholic.

V. CATHOLIC SCHOOLS ARE COMPLEMENTS TO, AND NOT COMPETITORS OF, THE PUBLIC SCHOOLS. OUR TRADITIONS CALL FOR FREE AND FRUITFUL COLLABORATION BETWEEN PUBLIC AUTHORITY AND PRIVATE INSTITUTIONS, INCLUDING CHURCHES, IN ENSURING THE BEST EDUCATION FOR ALL CHILDREN.

The history of the parochial school in America is inseparable from the history of majority groups' deep suspicion of Catholics – of their beliefs, of their ethnicity, and especially of their acceptance of our democratic way of life. This Court's treatment of the parochial school aid question has been colored by this ambient suspicion. The cases paint public and parochial schools as intense rivals for the hearts and minds of children, helplessly pulled

either toward the American way, or into a very different world, with ominously alien values.

This Cold War is over, too. Whether there was ever a basis in fact for the anti-Catholic fears which have so checkered our history, there is no longer. Catholic Americans have for centuries demonstrated their patriotism, by shedding their blood and by pledging their allegiance. The Church's commitment to democracy and freedom, moreover, is now firmly established as a matter of authoritative teaching. See generally John Paul II, Encyclical Letter *Evangelium Vitae* (1996).

Since this Court last invalidated a parochial school aid program in 1985 (*Aguilar v. Felton*, 473 U.S. 402; *Grand Rapids School District v. Ball*, 473 U.S. 373), there has developed a renewed appreciation for the role of religion in our public life, for the educational achievements of parochial schools, and for the value of free choice as a central element of our constitutional liberties. A plurality in *Mitchell* strongly criticized the characterization "pervasively sectarian," and for good reason: "[H]ostility to aid to pervasively sectarian schools has a shameful pedigree . . . it was an open secret that 'sectarian' was code for 'Catholic.' " 530 U.S. at 828. "This doctrine, born of bigotry, should be buried now." *Id.* at 829. These developments call for revisiting the concept of "pervasive sectarianism," and for abandoning it, at least as applied to Catholic schools. Then the free and fruitful collaboration of public authority and private institutions, characteristic of social services and health care, may come to the assistance of our nation's children, Catholic and non-Catholic alike.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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